

LETTER OPINION
98-L-113

August 25, 1998

Mr. Wayne P. Jones
Ransom County State's Attorney
P.O. Box 391
Lisbon, ND 58054-0391

Dear Mr. Jones:

Thank you for your letter posing three questions raised by the Ransom County Board of Commissioners.

You first question whether the county auditor may appoint a county commissioner to take notes of a meeting of the board of county commissioners if the meeting is out of town and the county auditor does not wish to attend. N.D.C.C. § 11-13-02 provides that it is the duty of the county auditor to act as clerk of the board of county commissioners and to keep an accurate record of the official proceedings of the board. N.D.C.C. § 11-11-36 provides that after the board approves the minutes and the minutes are signed by the chairman, the auditor shall attest to the accuracy of the minutes. These sections "envision the county auditor as being present at each meeting of the board of county commissioners, keeping an accurate record of the meeting, and attesting to the accuracy of the same." Letter from Assistant Attorney General Stephen Little to Wanda Kurts (Oct. 27, 1983).

N.D.C.C. § 11-10-11 authorizes the county auditor to appoint deputies, clerks, and assistants whose salaries are fixed by a resolution of the board of county commissioners. See also N.D.C.C. § 11-08-14 (county auditor, in county consolidated office form of government, may appoint deputy auditor and deputy clerk subject to approval of board of county commissioners). A duty imposed upon a ministerial officer may be performed by the officer's lawful deputy. N.D.C.C. § 1-01-11. The duties of the county auditor, including the duty to act as clerk of the board of county commissioners, may be performed personally by the county auditor or under the direction of the county auditor by a deputy auditor. Thus, the county auditor may assign a deputy auditor to attend an out of town meeting of the board of county commissioners and take minutes of the meeting to be used as the official proceedings of the board.

No North Dakota statute prohibits a county commissioner from being a deputy auditor. However, it is a well-settled rule of common law that a person may not, at one and the same time, rightfully hold two

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offices which are incompatible. Tarpo v. Bowman Public Sch. Dist. No. 1, 232 N.W.2d 67, 70 (N.D. 1975). As explained by the North Dakota Supreme Court:

It is hard, and the courts have hesitated to form a general definition of what constitutes incompatibility. Each case is discussed and decided upon its particular facts. The functions and duties of the offices are determinative of whether they are incompatible or not.

. . . [M]ere physical inability to perform the duties of both offices personally does not constitute incompatibility. It is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time.

State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951). Offices are generally considered incompatible where duties and functions of the offices are "inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially and efficiently the duties of both offices, considerations of public policy render it improper" for a person to retain both offices. Id. The same test must be applied to determine the compatibility of two positions held by an officer, even though one of the positions is not an "office." Tarpo, 232 N.W.2d at 71.

In Tarpo, the court addressed whether employment as a teacher and the office of school board member are incompatible. Applying the common-law rule of incompatibility of positions, the court found employment as a teacher and the office of school board member are incompatible. The court explained: "Two offices or positions are incompatible when one has the power of appointment to the other or the power to remove the other, and if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment." 232 N.W.2d at 71.

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It would be a conflict for a member of the county commission to maintain notes or minutes of the official proceedings of the board of county commissioners. The individual taking the notes or minutes should be a disinterested individual, not a participant, to remove the possibility that the notes or minutes will be biased by the note-keeper's participation in the meeting. Accordingly, based upon the common law rule of incompatibility, it is my opinion that a county commissioner may not act as deputy auditor and be assigned to take the minutes or notes of a meeting of the board of county commissioners. A county auditor may assign a deputy auditor to attend the county commission meeting and take notes.

You next question whether county commissioners have the authority to set courthouse hours. This office has previously determined that N.D.C.C. § 11-11-11(2) gives the board of county commissioners the authority to fix the time for opening and closing the courthouse. 1957 N.D. Op. Att'y Gen. 72. Also, N.D.C.C. § 11-11-11 authorizes the board of county commissioners to determine the hours county officials' offices will be open. Letter from Attorney General Helgi Johanneson to Governor William L. Guy (May 24, 1968). See also 1996 N.D. Op. Att'y Gen. 1 (Jan. 9 Op. to Oban) (citing the preceding 1957 and 1968 attorney general's opinions).

Thus, it is my opinion that the board of county commissioners has the authority to set the courthouse hours and the hours county officials' offices will be open. This includes the authority to require that the courthouse and offices be open over the noon hour.

Your final question concerns whether December 26, 1997, constitutes a "holiday" under Ransom County's employee manual. The employee manual provides that Ransom County will grant holiday time off to all employees on the specific enumerated holidays and "[a]ny other day appointed by the President of the United States or the Governor of the State of North Dakota." President Clinton, on December 25, 1997, issued an executive order stating, with certain exceptions, "[a]ll executive departments and agencies shall be closed and their employees excused from duty on Friday, December 26, 1997, the day following Christmas Day" Exec. Order No. 13068.

Interpretation of Ransom County's employee manual is strictly a county matter. Accordingly, consistent with the past practice of this office, I cannot offer an opinion on whether the term "holiday" as defined in Ransom County's employee manual includes December 26,

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1997.¹ I suggest the board of county commissioners, with your assistance, interpret its manual. Although not binding on the commission, the commission may be interested to know that December 26, 1997, was not considered a state holiday. N.D.C.C. § 1-03-01 provides a "holiday" includes every day appointed by the President of the United States for a public holiday. Although President Clinton closed federal departments and agencies on December 26, 1997, he did not declare it a "public holiday." For this reason, December 26, 1997, was not considered a holiday for purposes of state law.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dab/jjs/bah

cc: Bob Johnson, Association of Counties
Beth Innes, Williams County Auditor

¹ See 1997 N.D. Op. Att'y Gen. L-172 (Oct. 23 Op. to Sundeen) (the Office of Attorney General does not interpret local ordinances or home rule charter language); 1994 N.D. Op. Atty. Gen. 64 (April 19 Op. to Fitzner) ("this office generally does not interpret and give legal opinions on city ordinances"); 1993 N.D. Op. Atty. Gen. 71 (Oct. 28 Op. to Priebe) (opinion not issued on interpretation of city home rule charter because it does not involve state law and does not have statewide significance); Letter from Attorney General Nicholas J. Spaeth to W. R. Goulet, Jr. (June 19, 1987) ("Because the question presented involves the interpretation solely of a city ordinance and does not involve the interpretation of North Dakota statutory or constitutional law, I believe it would be inappropriate for the Attorney General to issue any opinion on this question."); Letter from Attorney General Nicholas J. Spaeth to David E. Nething (Aug. 28, 1986) ("Since the state and its statutes are not involved, I am without sufficient authority to interpret, discuss, or resolve procedural matters involving the city which are governed solely by their own ordinances."); Letter from Attorney General Nicholas J. Spaeth to Honorable Donald J. Kilander (Oct. 8, 1985) (opinion not issued on interpretation of city ordinance when state law is not involved).